Disparate Impact Abroad

Julie Suk

The Civil Rights Act of 1964 banned discrimination in various realms of social and economic life. Title VII, prohibiting discrimination in employment, gave rise to an innovative body of jurisprudence theorizing the very concept of discrimination. For the past five decades, Title VII doctrine has influenced not only the American workplace but also the growth of antidiscrimination law throughout the world. Several European jurisdictions took inspiration from Title VII to develop a body of equality law that appears more robust today than its American cousins. On the occasion of Title VII's fiftieth anniversary, this chapter reflects on this alternative trajectory of the disparate impact theory, Title VII's most ambitious and contested doctrine. European "indirect" discrimination law is a notable legacy of Title VII that raises hard questions about the future of the American Civil Rights Act.

Citations to Griggs v. Duke Power Company, the U.S. Supreme Court's landmark disparate impact case, can be found in the decisions of English courts, the Court of Justice of the European Union (CJEU), and the European Court of Human Rights (ECtHR) elaborating the doctrine of "indirect" discrimination. Griggs was transplanted into soil that had already been fertilized by similar legal reasoning in an earlier line of cases developed by the CJEU in the late 1960s and throughout the 1970s on the free movement of workers. European treaties guaranteed free movement of workers by dismantling employment practices that favored a nation's
own citizens. In early cases construing free movement of workers, the CJEU understood that barriers to the shared treaty goal of a common European market could arise from existing policies that indirectly disadvantaged nonnationals of any given member state. These cases draw out aspects of disparate impact doctrine that have not been fully appreciated in the United States. The comparison highlights the significance of pursuing a substantive shared goal, such as a single, common, integrated European labor market, in giving coherence to disparate impact theory. It points to a question that must be confronted in the next fifty years of antidiscrimination law in the United States: What, if anything, does this body of law aspire to achieve?

I. The Civil Rights Act and the Rise and Fall of Disparate Impact Discrimination

*Griggs v. Duke Power Company* was the first decision in which the Supreme Court repudiated an employer practice as a violation of Title VII. As is well known, the Duke Power Company required a high school diploma and a cutoff score on a general ability test for workers employed in any department other than its Labor Department. Prior to the adoption of these requirements, which coincided with the effective date of Title VII, the Duke Power Company had segregated its workers on the basis of race: black workers could only be assigned to the Labor Department and could not be transferred or promoted to the better-paid jobs in the company's other departments. In *Griggs*, the Supreme Court held that, even though the new criteria appeared racially neutral, they violated Title VII because they disproportionately disqualified blacks and were not shown to be significantly related to successful job performance. Writing for a unanimous Court, Justice Burger explained: "[G]ood intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as 'built-in headwinds' for minority groups and are unrelated to measuring job capability." Justice Burger also blessed consequentialist thinking about Title VII: "Congress directed the thrust of the Act to the consequences of employment practices, not simply the motivation." In a subsequent paragraph, Justice Burger generally challenged traditional indicators of accomplishment:

The facts of this case demonstrate the inadequacy of broad and general testing devices as well as the infirmity of using diplomas or degrees as fixed measures of capability. History is filled with examples of men and women who rendered highly effective performance without the conventional badges of accomplishment in terms of certificates, diplomas, or degrees. Diplomas
and tests are useful servants, but Congress has mandated the commonsense proposition that they are not to become masters of reality.6

For decades, scholars have debated the theory underlying the disparate impact definition of discrimination.7 On one end of the spectrum, the disparate impact is regarded primarily as an evidentiary dragnet for intentional discrimination. In the facts of this case, the Duke Power Company had been discriminating overtly on the basis of race until it was no longer lawful to do so, so it is perfectly plausible that the new facially neutral policy was a covert way of continuing the same racial discrimination. On the other end of the spectrum, the disparate impact theory articulates a principle that goes far beyond the elimination of intentional discrimination and its lingering effects. Individual employees are entitled, under a disparate impact theory, to consideration for jobs based on rational criteria that correspond to successful job performance and not based on arbitrary indicators of past privilege.8

During the years immediately following Griggs, as Reva Siegel has eloquently exposed, a majority of the federal courts of appeals used disparate impact frameworks to interpret equal protection, viewing a policy's racial effects as evidence of presumed purposes.9 The Supreme Court, however, limited the disparate impact theory in at least three different phases. First, in the late 1970s, the Supreme Court declined to extend the disparate impact theory to the Equal Protection Clause, holding that the Constitution only proscribes intentional discrimination.10 Second, in the 1980s, the Court heightened the burdens on Title VII plaintiffs seeking to establish disparate impact discrimination.11 Third, in the past decade, the Court in Ricci v. DeStefano has limited the scope of employers' permissible actions to avoid racially disparate outcomes by holding such actions to be intentionally discriminatory.12 The Obama administration has embraced the disparate impact theory as a construction of discrimination in violation of the Fair Housing Act.13 Although the Supreme Court has recently validated the disparate impact theory under the Fair Housing Act, its decision sustained disparate impact in its modern weakened form. The Court has noted that disparate impact must be "properly limited in key respects that avoid the serious constitutional questions that might arise...if such liability were imposed based solely on a showing of a statistical disparity."14

Even as disparate impact continues to be used in the United States, the Supreme Court's construction of it in Title VII cases has limited its potential. The second phase—by which U.S. courts heightened the burdens of proving the prima facie case for disparate impact plaintiffs and deferred to the justifications for disparate impacts proffered by
defendants—brings out the contrast between American and European courts’ approaches. The U.S. Supreme Court has required plaintiffs to do more than simply point to statistical disparities between groups to shift any burden, whether it is a burden of production or persuasion, to the employer. The plaintiff must identify a specific practice or requirement and show that it causes the disparity alleged to be discriminatory.

In *Wards Cove Packing v. Atonio*, cannery workers had sought to establish a prima facie case of disparate impact discrimination by relying on statistics showing a high percentage of nonwhite workers in certain jobs and a low percentage of nonwhite workers in better jobs. The Supreme Court held that a prima facie case could not be established by these facts alone, noting that “[i]f the absence of minorities holding such skilled positions is due to a dearth of qualified nonwhite applicants (for reasons that are not petitioners’ fault), petitioners’ selection methods or employment practices cannot be said to have had a ‘disparate impact’ on nonwhites.” In short, statistical disparities had to be accompanied by a causal theory about a practice undertaken by the employer that caused the disparity. In this decision, the robust prima facie case was purportedly necessary to avoid a world in which any employer who had a segment of his work force that was—for some reason—racially imbalanced, could be hauled into court and forced to engage in the expensive and time-consuming task of defending the ‘business necessity’ of the methods used to select the other members of his work force.

In that landscape, the Court predicted, the “only practicable option for many employers would be to adopt racial quotas.” And since quotas were “expressly rejected” by the drafters of Title VII and would be “far from the intent of Title VII,” the *Wards Cove* Court concluded that statistical disparities alone could never be enough to force an employer to articulate some explanation or justification for those disparities.

After *Wards Cove* and the Civil Rights Act of 1991, courts have consistently required plaintiffs to identify the specific employment practice that caused the disparate outcomes that are being challenged. In *Wal-Mart v. Dukes*, the Supreme Court rejected the class certification of plaintiffs’ disparate impact claims by invoking the disparate impact plaintiff’s burden of identifying a specific practice to establish the prima facie case. The Court noted: “Other than the bare existence of delegated discretion, respondents have identified no ‘specific employment practice’—much less one that ties all their 1.5 million claims together.”

And even when the plaintiff establishes a prima facie case of disparate impact discrimination, the burden that shifts to the employer is not particularly demanding. Once a prima facie case is established, the plaintiff
wins unless the employer can prove that the specific practice is justified by business necessity. The employer must show a legitimate business purpose for the policy that causes a disparate impact, and the employee can then point to alternative means of achieving that purpose that have less of a disparate impact. *Wards Cove* had held that the employer merely had a burden of production, not persuasion, in response to the plaintiff's prima facie case of disparate impact discrimination.\(^{23}\) Congress amended Title VII in 1991 to overrule this aspect of *Wards Cove*.\(^{24}\) So, for the past two decades, employers have the burden of showing business necessity once a prima facie case of disparate impact has been made. Yet, following the 1991 Act, courts accepted reasonable legitimate nondiscriminatory reasons as meeting the "business necessity" standard required by the statute.\(^{25}\) As Michael Selmi notes, "courts readily accept most proffered justifications."\(^{26}\) The weakness of U.S. disparate impact doctrine comes into clearer focus when encountering the development of disparate impact doctrine abroad.

II. The Migration of *Griggs*

While the evolution from *Griggs* to *Ricci* is a story of disparate impact's decline in the United States, *Griggs* migrated and followed an alternative trajectory in Europe, by way of Britain. *Griggs* influenced the drafting of the United Kingdom's Sex Discrimination Act. Roy Jenkins, the U.K. Home Secretary, made a visit to the United States in 1974, when the government was proposing a new law on sex discrimination.\(^{27}\) Jenkins was accompanied by Anthony Lester, a lawyer who had been active in litigating on behalf of discrimination plaintiffs under the Race Relations Act.\(^{28}\) Shortly before their visit to the United States, the government had published a white paper, *Equality for Women*, largely drafted by Lester. The white paper had proposed that unlawful discrimination should only include intentional discrimination: "In the absence of any intention (or inferred intention) to treat one person less favourably than another on the grounds of sex or marriage, there will be no contravention of the proposed Bill."\(^{29}\) However, after Jenkins's visit to the United States, the Sex Discrimination Act was redrafted to include indirect discrimination, an idea that was directly shaped by the Jenkins's and Lester's encounter with *Griggs*. Lester recounts:

We were much influenced in determining the content of the sex and race equality laws by the U.S. civil rights law, including the crucial concept of disparate impact discrimination articulated by the American Supreme Court in *Griggs* v. Duke Power Co. in 1971....We learned about that concept when we
visited the United States in December 1974; but it was expressed in unnecessarily restrictive language in section 1(l)(b) of the Sex Discrimination Act.\textsuperscript{30}

Thus, the line of influence between \textit{Griggs} and the indirect discrimination provision of the Sex Discrimination Act was conscious and direct. The Sex Discrimination Act, like the Race Relations Act of 1968, begins by defining discrimination as less favorable treatment:

\begin{quote}
(l) In any circumstances relevant for the purposes of any provision of this Act...a person discriminates against a woman if—
\begin{enumerate}
\item On the ground of her sex he treats her less favourably than he treats or would treat a man.\textsuperscript{31}
\end{enumerate}
\end{quote}

But after Jenkins's and Lester's encounter with \textit{Griggs}, the proposed statute that eventually passed also included the disparate impact provision at section 1(l)(b), which then influenced a revision of the Race Relations Act in 1976:

\begin{quote}
b. \textit{He applies to her a requirement or condition which applies or would apply equally to a man but—}
\begin{enumerate}
\item which is such that the proportion of women who can comply with it is considerably smaller than the proportion of men who can comply with it, and
\item which he cannot show to be justifiable irrespective of the sex of the person to whom it is applied, and
\item which is to her detriment because she cannot comply with it.\textsuperscript{32}
\end{enumerate}
\end{quote}

Anthony Lester also invoked the indirect discrimination idea when litigating cases arising under the British Equal Pay Act. Lester's litigation strategy involved requests to English courts to refer the disparate impact construction of the Equal Pay Act to the European Court of Justice, with the aim of bringing the disparate impact theory to European Community law and then harmonizing EC law with English law.\textsuperscript{33} Thus, \textit{Griggs}'s disparate impact theory migrated yet again to the European level, and it is in the jurisprudence of the CJEU that the law of disparate impact, through the doctrine of indirect discrimination, has been given an expansive scope, both in terms of the doctrinal bases for liability and in terms of the transnational diffusion of legal norms.

In 2003, further amendments to the British Race Relations Act heightened the justification requirement in the standard for indirect discrimination. The statute required employers to show not only that the justification is unrelated to the sex or race of the persons involved but also that the justification is proportionate to a legitimate aim. In addition, the Race Relations Act's definition of indirect discrimination was
broadened: to include a “provision, criterion, or practice,” not merely a “requirement or condition”:

A person also discriminates against another if...he applies to that other a provision, criterion or practice which he applies or would apply equally to persons not of the same race or ethnic or national origins as that other, but:
(a) which puts or would put persons of the same race or ethnic or national origins as that other at a particular disadvantage when compared with other persons,
(b) which puts or would put that other at that disadvantage, and
(c) which he cannot show to be a proportionate means of achieving a legitimate aim.34

The 2003 Amendment to the Race Relations Act was adopted in order to comply with the European Union’s Race Equality Directive of 2000. The Race Directive required all member states to adopt antidiscrimination laws that included a prohibition of indirect discrimination subject to a proportionality test:

(b) [I]ndirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons of a racial or ethnic origin at a particular disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.35

This same definition of indirect discrimination was applied in the EU’s Framework Directive on Equal Treatment, which prohibits and defines discrimination on the basis of religion, disability, age, and sexual orientation.36 The U.K. statutory framework has been revised again, unifying the Sex Discrimination Act, the Race Relations Act, and other antidiscrimination statutes under a single Equality Act. The Equality Act retains the basic definitions of the 2003 Race Relations Act on indirect discrimination. It provides that a “provision, criterion or practice” is indirectly discriminatory in violation of the Act when the following four conditions are met:

a. A applies, or would apply, it to persons with whom B does not share the characteristic,
b. it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,
c. it puts, or would put, B at that disadvantage, and
d. A cannot show it to be a proportionate means of achieving a legitimate aim.37

Scholars of antidiscrimination law in Britain have acknowledged the influence of Griggs on the Sex Discrimination Act, the Race Relations
Act, and decisions of the European Court of Justice and the European Court of Human Rights.\textsuperscript{38}

III. The Disparate Lives of Disparate Impact

In the last thirty years, the CJEU has developed an indirect discrimination doctrine that diverges in at least four significant respects from American disparate impact law. First, the indirect discrimination idea emerged to construe a treaty guarantee of “equal pay for male and female workers for equal work.”\textsuperscript{39} By contrast, in the United States, the Supreme Court declined to import the disparate impact theory into its construction of the Equal Pay Act.\textsuperscript{40} Second, the outcomes reached in CJEU cases are arguably more protective of women workers than are those reached by U.S. courts interpreting Title VII. For example, U.S. courts have declined to extend disparate impact theory to proscribe discrimination against part-time workers.\textsuperscript{41} In Europe, early cases established that discrimination against part-time workers disproportionately burdened women, as women were statistically more likely than men to be engaged in part-time work. Thus, the CJEU drew on the concept of indirect discrimination to instruct national tribunals to scrutinize the justifications employers gave for any policies that treated part-time workers worse than full-time workers. Third, the CJEU’s case law enables plaintiffs to establish a prima facie case more easily than American courts have permitted. A series of CJEU cases of the 1980s and the 1990s permit the plaintiff to establish a prima facie case of indirect discrimination by presenting a disparity between the advantaged and disadvantaged group, without proving the disparity to be caused by a specific identifiable practice. Thus, the burden on the employer is more easily triggered. Finally, the employer’s burden in European indirect discrimination cases is heavier than that in U.S. disparate impact cases. According to the CJEU, the employer must defend a specific practice if one is identified by a plaintiff, or must prove that the disparity was caused by an employer policy with a legitimate aim and that the means of pursuing that aim were necessary and appropriate. The CJEU applied proportionality analysis to the employer’s “business necessity” defenses, making it more difficult for the employer to defend itself in the face of a prima facie case.

This evolution appears to have been catalyzed by Griggs. The CJEU first cited Griggs in Jenkins v. Kingsgate Clothing Productions, Ltd., in construing the equal pay guarantee of Article 141 of the EC Treaty (then Article 119 of the EEC Treaty).\textsuperscript{42} The application of disparate impact theory to an equal pay case is itself an interesting contrast with the American
doctrinal landscape, as the U.S. Supreme Court has explicitly declined to extend Griggs to construe the Equal Pay Act. The CJEU heard the equal pay case through a preliminary reference from the Employment Appeal Tribunal of the United Kingdom, before which Anthony Lester had brought an equal pay claim on behalf of Mrs. Jenkins under English law as well as EC law. Mrs. Jenkins was a part-time employee, and her rate of pay was 10 percent lower than full-time employees performing the same work. All the male employees except one worked full-time, and four of the five part-time employees were women. In the preliminary reference proceedings before the CJEU, Lester argued that paying part-time workers a lower rate than that paid to full-time workers for the same work constituted sex discrimination because of its disparate impact on women, unless such a policy could be objectively justified.

The CJEU highlighted Jenkins' reliance on Griggs in its decision:

Mrs. Jenkins also refers to the principle enunciated by the Supreme Court of the United States in Griggs v Duke Power Co 401 US 424 (1971), according to which what must be prohibited are not merely practices which are intended to discriminate, but equally those which are discriminatory in their effect, irrespective of the intentions of their authors.

Although the Jenkins decision does not elaborate on the meaning and scope of Griggs, the Advocate General's opinion in that case is illuminating. It is obvious that Advocate General Warner's understanding of Griggs was shaped by Lester's submissions:

At the hearing Counsel for Mrs.[.] Jenkins explained that what that proposition meant "in plain language" was that if, as was clearly the case, women were less able to work 40 hours a week than men, because of their family responsibilities, the requirement that an employee should work 40 hours a week to earn the full hourly rate must obviously hit, in a disproportionate way, at women, compared with men. That did not necessarily mean that there was discrimination, but it did mean that there was prima-facie discrimination in effect, which required "some special justification from the employer." Counsel called this the "Griggs approach" after the decision of the Supreme Court of the United States in Griggs v. Duke Power Company (1971), 401 US 424.

Griggs facilitated the expansion of the discrimination concept to include employment practices that disadvantaged women because of their family responsibilities. Jenkins was the first in a line of CJEU decisions that used the indirect discrimination concept to scrutinize employers' policies toward part-time workers. The court concluded that, where unequal treatment of part-time and full-time workers had a disproportionate
impact on women, such treatment had to be "objectively justified" based on reasons other than sex.49

From the beginning, the European notion of "objective justification" had some teeth. The employer purported to have a commercial interest in encouraging its employees to work longer hours. The CJEU acknowledged that this interest could constitute an objective justification and left it to national courts to scrutinize whether an employer's allegation of such an interest was convincing in any individual case. At the same time, the court expressed some skepticism of the proffered business justification in this case: "If an employer wished to encourage his employees to work longer hours, he should pay a suitable overtime rate and not reduce the pay of those working part-time."50 Thus, an objective justification required consideration of other ways of achieving the purported legitimate aims, without the disadvantaging effect on women.

Griggs provided European courts with inspiration and transnational authority to develop an indirect discrimination doctrine that would scrutinize employer policies that disadvantaged women with family responsibilities. Two subsequent cases, both involving unequal treatment of part-time workers, developed this idea. In Bilka-Kaufhaus GmbH v. Weber von Hartz, the CJEU confronted the question of whether a German department store had violated the equal pay provision of the EEC Treaty by refusing to pay a pension for employees who had not worked full-time for a minimum of fifteen years.51 Karin Weber von Hartz, a woman who had worked for the department store part-time for fifteen years, argued that the pension policy placed women workers at a disadvantage "since they were more likely than their male colleagues to take part-time work so as to be able to care for their family and children."52

The CJEU built on the logic of Jenkins v. Kingsgate and concluded that excluding part-time workers from the occupational pension scheme would violate the equal pay provision where, "taking into account the difficulties encountered by women workers in working full-time, that measure could not be explained by factors which exclude any discrimination on grounds of sex" but rather by "objectively justified factors."53 Bilka, the department store, argued, as Kingsgate had, that its policy was justified as a discouragement of part-time work.54 Weber von Hartz pointed out that Bilka could discourage part-time work simply by refusing to hire part-time workers, and the European Commission urged the court to adopt a test that would require pay practices to be "necessary and in proportion to the objectives pursued by the employer"55 to comport with the treaty's equal pay provision. Here, the CJEU spelled out a proportionality standard, strongly implied in Jenkins, for the employer's justification of policies that disadvantaged women. It required the
national courts to find "that the means chosen for achieving that objective correspond to a real need on the part of the undertaking, are appropriate with a view to achieving the objective in question and are necessary to that end."\textsuperscript{56}

While making the justification burden on the employer heavier, the CJEU stopped short of reading the equal pay provision as imposing positive duties on employers to accommodate workers' family responsibilities. The court concluded: "Article 119 does not have the effect of requiring an employer to organize its occupational pension scheme in such a manner as to take into account the particular difficulties faced by persons with family responsibilities in meeting the conditions for entitlement to such a pension."\textsuperscript{57} Advocate General Darmon, in denying the existence of employers' positive duties in this regard, affirmed the existence of positive duties on the part of the state in compensating for the disadvantages caused by family responsibilities: "[A]n employer cannot be required to take over the role of the authorities in constructing a pension scheme which will compensate for the special difficulties faced by workers who have family responsibilities."\textsuperscript{58} AG Darmon also suggested that such positive duties, on the part of the state, could even be located in the equal pay provision of the treaty: "Article 119 lays positive duties only on the Member States and not on commercial undertakings, which are subject, within the limits described above, only to an obligation not to discriminate."\textsuperscript{59}

Seven years later, in \textit{Enderby v. Frenchay Health Authority},\textsuperscript{60} the CJEU strengthened the proportionality requirement in the indirect discrimination standard in a case challenging the pay inequality between speech therapists and pharmacists employed by a state health authority. Pharmacists, who were predominantly male, were paid more than speech therapists, who were predominantly female. In this case, the state health authority gave two justifications for paying pharmacists more than speech therapists. First, the rates of pay had been determined through collective bargaining processes conducted by the same trade union, and second, the pay reflected, in part, the shortage of candidates for pharmacist positions and the need to attract them with higher salaries.\textsuperscript{61} In \textit{Enderby}, the CJEU concluded that a prima facie case of indirect discrimination could be established by a statistical showing that a job with lower pay is predominantly occupied by women, while a comparable job with higher pay is predominantly occupied by men.\textsuperscript{62} Once this prima facie case has been made, the burden of proof shifts to the employer, who must then show that the difference in pay is based on "objectively justified factors unrelated to any discrimination on grounds of sex."\textsuperscript{63} \textit{Enderby} requires national courts to apply the principle of proportion-
ality to determine "whether and to what extent the shortage of candidates for a job and the need to attract them by higher pay constitutes an objectively justified economic ground for the difference in pay between the jobs in question." In addition, the mere fact that any pay rate was produced by collective bargaining could not be accepted as an "objective justification" for a difference in pay.

As Advocate General Lenz makes clear in his opinion, the Enderby decision does not require complainants to point to a specific requirement or practice of the employer that causes the disparate impact. It appears sufficient for the female plaintiffs to have established through statistics that jobs predominantly held by women are paid less than those held by men in order to make out a prima facie case of indirect discrimination, which then places a proportionate objective justification burden on the employer.

Griggs thus invigorated the evolution of a European doctrine of indirect discrimination, primarily in cases construing the meaning of equal pay between men and women. But Griggs's influence, both directly and by way of CJEU case law, was not limited to the gender context. The European Court of Human Rights (ECtHR) cited Griggs in its landmark 2007 ruling, D.H. & Others v. Czech Republic, which recognized an indirect discrimination theory to find a violation of the equality guarantee in Article 14 of the Convention, taken in conjunction with the Article 2 Protocol 1 right to an education. The claimants argued that a Czech government's disproportionate assignment of Roma children to special education programs constituted a form of indirect discrimination in violation of Article 14.

In issuing its final decision in that case, the Grand Chamber of the ECtHR closely followed the approach developed by the European Court of Justice. The ECtHR began to scrutinize the Czech government's policies and justifications for them after the claimant's presentation of official statistics documenting a racial disparity in assignments to special school. The claimants had shown that Roma children were grossly overrepresented in special schools, where they received an inferior education. But the claimants had not made any showing that any specific policies, such as the particular psychological exams employed, caused the disproportionate outcomes. The statistical disparity was sufficient to require the Czech government to justify its entire scheme of special education assignment. Based merely on the presentation of undisputed reports that Roma children had constituted 70 to 90 percent of students in special schools since the 1990s, the ECtHR concluded:
In these circumstances, the evidence submitted by the applicants can be regarded as sufficiently reliable and significant to give rise to a strong presumption of indirect discrimination. The burden of proof must therefore shift to the Government, which must show that the difference in the impact of the legislation was the result of objective factors unrelated to ethnic origin.69

Following the CJEU’s approach, the ECtHR applied a proportionality test to the government’s proffered justifications. The Czech government explained the disparities by claiming that they were the result of legitimate attempts to adapt the education system to the capacities of children with special needs. Specifically, they argued that the disparities resulted from the use of psychological tests that measured children’s capacities, which were used to make school assignments. Once the assignments were made, the parents consented. Thus, the government attributed the disparities to the intellectual capacities of Roma children and parental consent. The government claimed that parental consent was “the decisive factor without which the applicants would not have been placed in special schools.”70 The court rejected the government’s submissions, first by raising the possibility that the tests were biased or that their “results were not analysed in the light of the particularities and special characteristics of the Roma children who sat them,”71 and second, by holding that parents could not validly consent to discriminatory treatment, which would amount to an impermissible waiver of a Convention right.72

The ECtHR’s approach in D.H. & Others v. Czech Republic illustrates the gulf between current European jurisdictions’ “indirect discrimination” concept and disparate impact doctrine in the United States. In Europe, discrimination plaintiffs can shift the burden of justification to the alleged discriminator simply by pointing out a disparity and alleging that the defendant is responsible for it. It is then for the defendant to explain the causes of the disparity, specifically that the disparity results from the pursuit of legitimate aims, and that the means utilized are necessary and appropriate toward achieving those aims. In the absence of this “objective justification,” disparate outcomes are presumed to indicate discriminatory causes. The ECtHR’s indirect discrimination framework has become firmly established in subsequent cases. In two similar decisions challenging the overrepresentation of Roma children in special schools for the mentally disabled or academically challenged, the ECtHR has required the state to justify the overrepresentation after a statistical showing of disparity, and has then rejected the state’s justifications.73
IV. Indirect Discrimination before Griggs: Free Movement of Workers of All Nationalities within the European Community

Despite the embrace of Griggs in the CJEU’s early indirect discrimination decisions, the European concept of disparate impact discrimination was not merely transplanting American antidiscrimination law. In fact, Griggs was imported to strengthen and give structure to a concept of discrimination that the CJEU had developed in 1969 to enforce a treaty provision guaranteeing the free movement of workers. In this context, the norm against discrimination on the basis of nationality within the European Economic Community was not primarily a protection of individuals from the dignity-harms of unequal treatment. Rather, the EC Treaty prohibited discrimination on the basis of nationality to enable the members of the European Economic Community to work toward the primary goal of their treaty: the creation of a single European market.

The influence of the free movement cases is subtle but explicit in Advocate General Warner’s opinion in Jenkins v. Kingsgate. In that opinion, AG Warner distinguished between the so-called Griggs approach and that advanced by an English case, Clay Cross (Quarry Services) Ltd. v. Fletcher. Warner read Clay Cross as developing an effects-based test for discrimination as an evidentiary dragnet for intentional discrimination and suggested it was inapplicable to the instant case. He then went on to embrace the Griggs approach instead, reading Griggs as allowing a prima facie case to be established by evidence of disproportionate effects of an employer policy on men and women and then requiring the employer to provide some special justification. At that point, he noted: “I draw similar comfort from the fact that that conclusion accords with a familiar line of authority in this Court, Case 152/73 Sotgiu v Deutsche Bundespost [1974], 1 ECR 158, Case 61/77 Commission v Ireland [1978] ECR 417 and Case 237/78 CRAM v Toia [1979] ECR 2645.”

Article 48 of the EEC Treaty (EC Treaty article 39, and currently Treaty on the Functioning of the European Union art. 45) provided: “Freedom of movement for workers shall be secured within the Community” and specified that “[s]uch freedom of movement shall entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment.” Additionally, a Council regulation adopted in the 1960s, addressing terms and conditions of work as well as unemployment and dismissal procedures, stated: “A worker who is a national of a Member State may not, in the territory of another Member State, be differently treated from national workers by reason of his national-
ity..." The common market created by the treaty in 1958 was based on four fundamental freedoms: free movement of persons, services, goods, and capital. These freedoms were delineated as essential to the creation of a single economic area.

In *Sotgiu v. Deutsche Bundespost*, the first free movement case mentioned by the Advocate General in *Jenkins*, the CJEU developed the concept of "indirect" discrimination in the context of interpreting Article 48 of the EEC Treaty. Mr. Sotgiu was an Italian citizen working in Germany for the German postal service. Postal workers in Germany who were employed away from their place of residence received a separation allowance. However, the separation allowance was higher for workers whose residence at the time of their initial employment was within the Federal Republic of Germany than for workers whose residence at the time of their initial employment was abroad. But the policy did not obviously treat German nationals differently from foreign nationals. The policy did not use the nationality of workers as a criterion for different treatment. An Italian national who was already residing in Germany before taking the job with the German postal service would get the same separation allowance as a German national in the same situation, and a German national who was residing abroad before taking the job with the German postal service would get the same reduced allowance paid to foreign nationals living abroad before the initial employment.

Nonetheless, the CJEU concluded that the policy at issue violated the prohibition of discrimination based on nationality in the free movement provisions of the EEC Treaty. In justifying its decision, the court stated:

The criterion of the place of recruitment might make it possible to circumvent the prohibition on discrimination based on nationality: in fact workers recruited abroad are normally of foreign nationality and a criterion of differentiation based on place of recruitment of the worker would lead substantially to discrimination against non-national Community workers. Such a criterion is contrary to the principle of freedom of movement.

The inquiry is not a technical one as to whether the distinction made is one of nationality but a question of principle: Does the category at issue, whether it can be viewed as a proxy for nationality or not, contravene the principle of freedom of movement?

The court then framed the problem as one of "hidden or indirect discrimination," taking a very fact-based, consequentialist, practical approach:

The concepts of discrimination and of nationality must be interpreted on the basis of factual criteria. A purely theoretical idea is not sufficient. Rules
based on other criteria such as residence abroad, language, place of birth, descent or performance of military service in the country may in fact conceal discrimination on the basis of nationality. Such would be the case in particular if the application of certain criteria of differentiation were to result, in all cases or in the vast majority of cases, in foreigners alone being affected without any objective justification. 81

Here, we can discern the outlines of an indirect discrimination test that was given much fuller articulation seven years later in Jenkins v. Kingsgate. If a rule or criterion disproportionately affects foreigners, an objective justification must be present to avoid a finding of nationality discrimination. Further, the court provides some guidance to be applied by the national court as to what might or might not constitute an objective justification:

The criterion of residence abroad might not appear to be discriminatory in a case in which, unlike workers recruited within the country, workers recruited abroad receive a separation allowance without having to find a home in the country of employment or to remove, and in which they receive the allowance at the lower rate for a practically unlimited period throughout of the whole of their period of employment. The question whether this scheme gives rise to discrimination either in intention or in effect, or whether it is only intended to control one particular situation in an objective way, should be settled in terms of national law. 82

If, for example, the employer were to require its own nationals to relocate to the city of employment, thereby paying a larger allowance for a shorter period of time, while permitting nonnationals to commute with a smaller allowance for an indefinite period, the court suggests that this could meet the objective justification test. These arrangements would appear to facilitate, rather than undermine, the nonnationals' ability to work in a different member state. Ultimately, what matters with regard to the objective justification is whether, as the court stated earlier, the principle of free movement of workers is contravened.

The Sotgiu case was decided in 1974, after Griggs. But the indirect discrimination idea that is so robustly articulated in Sotgiu does not cite Griggs, and there is no indication that Griggs played any role. The idea of indirect discrimination derived from a 1969 free movement case before the CJEU. Invoking both the treaty provision prohibiting nationality discrimination as well as the regulations, an Italian citizen who was working in Germany challenged the application of a German law, which entitled workers who had served in the German armed forces to have their periods of military service counted as time employed for the purposes of wage regulations and collective contracts. 83 Salvatore Ugliola, the Italian employee of a German company, sought to have his military ser-
vice for Italy counted for the purpose of calculating his duration of employment. Again, the policy did not necessarily treat German nationals and nonnationals differently. Germans who did not serve in the German military would be treated the same as non-Germans who did not serve in the German military. The German government pointed out that the law providing for the counting of military service as employment was part of German military law, not German labor law. Thus, the law was presented as a policy enabling the German state to compensate employment disadvantages sustained by persons who had served in their military. Germany argued that, therefore, there had been no discrimination based on nationality.

The CJEU responded to this line of argumentation by focusing on the effects of a policy rather than the intent behind it. Thus, the concept of “indirect” discrimination emerged:

A national law which is intended to protect a worker who resumes his employment with his former employer from any disadvantages occasioned by his absence on military service, by providing in particular that the period spent in the armed forces must be taken into account in calculating the period of his service with that employer falls within the context of conditions of work and employment. Such a law cannot therefore, on the basis of its indirect connexion with national defence, be excluded from the ambit of Article 9(1) of EEC Regulation No 38/64 and Article 7 of EEC Regulation No 1612/68 on equality of treatment and protection for migrant workers “in respect of any conditions of employment and work.”

Article 48 of the Treaty does not allow Member States to make any exceptions to the equality of treatment and protection required by the Treaty for all workers within the Community by indirectly introducing discrimination in favour of their own nationals alone based upon obligations for military service.84

Here, the concept of “indirect” discrimination is not the same as “disparate impact” discrimination. The discrimination in this context is “indirect” in the sense that the law makes no explicit facial distinction between Italian workers and German workers and does not use nationality, as such, as a criterion of differentiation. It distinguishes on the basis of the government for which one has performed military service. The law could benefit a foreign national who performed military service for Germany or disadvantage a German who performed military service for another nation. This is why the discrimination is characterized as “indirect.”

The CJEU’s reasoning as to why the treaty must prohibit these “indirect” forms of discrimination can be discerned in Advocate General Gand’s opinion. He points out that “performance of military service in the army of the State other than that of which one is a national is a
hypothesis which even the Government of the Federal Republic of Germany considers to be somewhat theoretical." Advocate General Gand identifies the obvious consequences of the law for Germans and non-Germans: "In fact, the provision in question only benefits German citizens..." But instead of harping on the Italian national's right to equal treatment, Gand emphasizes that "the very purpose of the regulation on freedom of movement is precisely to abolish such privileges." In short, what's wrong with German policies that benefit German workers only is that they hamper the integration of the European market. The wrong of discrimination is located by reference to one of the four fundamental freedoms protected by the European Economic Community—specifically, free movement of workers. Finally, Gand points out that, while indirect forms of discrimination are prohibited, the possibility of justifying policies that undermine free movement is articulated in the limitations in Article 48, Paragraph 3 of the treaty. Section 3 provides that the freedom of movement for workers is subject to limitations justified on grounds of public policy, public security, or public health. Applying this standard, AG Gand concludes that there are no such grounds that could justify the employment policy of remunerating former German military members at a higher rate. In the cases of the 1970s protecting the free movement of workers, the CJEU did not draw a sharp line between direct and indirect discrimination. Rather, national rules or employer policies that disadvantaged nationals of one member state were generally scrutinized to determine whether the interference with workers' free movement and European integration could be tolerated.

V. Conclusion

Thus, the European approach to indirect discrimination originated before the citations to Griggs, in cases rooting out member state policies that had the effect of advantaging workers who were nationals of that state. Such policies made sense when markets were national, but they were contrary to the goal of a common supranational market. When the CJEU invalidated such policies, it was aiming not to eradicate racism or national animus but rather to end a prior set of institutional arrangements that supported a different type of market. Thus, the European law of indirect discrimination, unlike disparate impact law in the United States, did not begin as an evidentiary dragnet for racism, ethnic animus, or any other evil that was being repudiated and rooted out by law. Rather, indirect discrimination doctrine began because it was acknowledged that the new and collectively shared goal of European economic
integration would require the eradication of existing practices that had been premised on a different, nation-centered economic model.

The amalgamation of Griggs’s disparate impact theory with the indirect discrimination theory in the free movement cases highlights the potential and limits of American antidiscrimination law. The free movement line of cases envisions the paradigmatic instance of discrimination as a privilege reserved for nationals, not a rights violation stemming from animus. That privilege is problematic not because it is morally repugnant but because it undermines the fundamental goal articulated by the treaties organizing the European Economic Community: the economic integration of these national markets. Similarly, the Griggs Court characterized the policies that it repudiated as “barriers that have operated in the past to favor an identifiable group of white employees over other employees.”

Does anything significant happen if we say that the target of disparate impact liability—or antidiscrimination law in general—is not black disadvantage but white advantage? What is the difference between characterizing the purpose of Title VII as the eradication of white advantage, as contrasted with the eradication of black disadvantage? If white advantage is to be eradicated by antidiscrimination law, one might argue that this goal can only be achieved by forging a new economic and political order after segregation. Yet Title VII did not deliver the architecture for one.

Sociologists have suggested that racial inequalities today are largely the result of whites’ ordinary use of available social networks and resources to amass opportunities for themselves. Most people help their friends and family find educational opportunities and jobs, if possible. (In fact, many people believe this is what it means to be a good parent or friend.) Should civil rights law regard these dynamics as illegitimate “opportunity-hoarding” or desirable methods of preserving much-needed social capital? It would only be possible to render “opportunity-hoarding” as illegitimate if one developed an account of how these behaviors significantly undermined clearly shared social goals, such as the eventual and complete racial integration of American civil society.

The evolution of a robust indirect discrimination doctrine in Europe suggests some limits to the concept of discrimination. When the concept of discrimination emphasizes effects and consequences rather than practices or procedures, those consequences have to be understood in relation to a collective goal. It is only because the European Community was attempting to create a single market that policies undermining the four fundamental freedoms become problematic. Note also that the freedoms that are thought to be “fundamental” are not freedoms in a universalistic human rights sense. They are freedoms instrumental to
the project of European integration. Free movement of workers only refers to workers within the European economic community and not to an abstract free labor idea. The freedoms are valuable primarily by reference to their furtherance of the articulated goal of creating a common market. Within fifty years, enforcing the norm against nationality discrimination within the European Community enabled a transnational integration of labor markets. The EU is now the largest internal market in the world, and it exercises enormous regulatory power globally.

By contrast, the Civil Rights Act in the United States did not aspire to the collectively shared purpose of a fully racially integrated workplace. Rather, the American ideal of equal opportunity appears consistent with the absence of integration. In fact, the framers of the Civil Rights Act explicitly avoided defining what the end-state of this body of law should be and made clear that the prohibition of discrimination would never require employers to achieve racial balance. As Ricci illustrates, the fear of encouraging the use of quotas motivates courts to limit the disparate impact theory. As we prepare for the next half-century of Title VII in the United States, we must confront the difficult question of whether American antidiscrimination law has any collectively shared social goal. Are we striving for a total racial integration of the workplace by Title VII’s centennial? If not, one wonders what the Civil Rights Act is for today.

About the Author

Professor of law, Benjamin N. Cardozo School of Law—Yeshiva University. Many thanks to Daniel Halberstam, Christopher McCrudden, Reva Siegel, and the participants in the University of Michigan Law School Symposium on The Civil Rights Act at 50 for helpful comments on an earlier draft.

Notes

2. Id. at 427–28.
3. Id. at 427.
4. Id. at 432.
5. Id.
6. Id. at 433.
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14. *Texas Dep’t of Housing & Community Affairs v. Inclusive Communities Project, June 25, 2015, slip op. at 18.*


16. *Id. at 651–52 (1989).*

17. *Id. at 652.*

18. *Id.*

19. *Id.* (quoting Albemarle Paper Co. v. Moody, 422 U.S. 405, 449 (1975) (Blackmun, J., concurring)).

20. *See, e.g., McClain v. Lufkin Indus., 519 F.3d 264, 275–79 (5th Cir. 2008); EEOC v. Joe’s Stone Crab, Inc., 220 F.3d 1263, 1275, 1288 (11th Cir. 2000); Davis v. Cintas Corp., 717 F.3d 476, 497 (6th Cir. 2013).*


22. *Id.*


28. *Id.*


32. Id. § 1(1)(b).
34. Race Relations Act, 1976, c. 74, § 1A (U.K.) (as amended).
40. See Cty. of Wash. v. Gunther, 452 U.S. 161, 170-71. The Equal Pay Act prohibits employers from “paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions.” 29 U.S.C. § 206(d). Unlike the equal pay guarantee of the EEC treaty, the U.S. Equal Pay Act permits “a differential based on any other factor other than sex.” The Court has read this language to bar disparate impact constructions of the Equal Pay Act’s nondiscrimination guarantee.
41. See, e.g., Ilhardt v. Sara Lee Corp., 118 F.3d 1151, 1157 (7th Cir. 1997).
43. See City of Los Angeles Dep’t of Water & Power v. Manhart, 435 U.S. 702, 710 n.20; Cty. of Wash. v. Gunther, 452 U.S. at 170-71.
45. Id. at 934-35.
46. Id. at 936 (quoting Counsel for Mrs. Jenkins).
47. Jenkins, Case 96/80, at 916.
49. Jenkins, Case 96/80, at 925.
50. Id. at 916.
52. Id. ¶ 6.
53. Id. ¶¶ 29-30.
54. Id. ¶ 33.
55. Id. ¶ 40.
56. Id. ¶ 37.
57. Id. ¶ 43.
59. Id.
61. Id. ¶ 4.
62. Id. ¶ 19.
63. Id. ¶¶ 14, 19.
64. Id. at I-05577.
67. Id. ¶ 210.
68. See id. ¶¶ 188–203.
69. Id. ¶ 195.
70. Id. ¶ 202.
71. Id. ¶ 201.
72. Id. ¶¶ 202–03.
75. Id. at 937.
76. Id.
80. Id. at 158.
81. Id. at 160–61.
82. Id. at 161.
84. Id. ¶¶ 5–6.
86. Id.
87. Id.
88. Id.
89. *Id.* (citing EEC Treaty art. 48(3)).

90. *Id.*


List of Contributors

Kathryn Abrams is the Herma Hill Kay Distinguished Professor of Law at the UC-Berkeley School of Law.

Samuel R. Bagenstos is a professor of law at the University of Michigan Law School.

Devon Carbado is the Honorable Harry Pregerson Professor of Law at the UCLA Law School.

Brian T. Fitzpatrick is a professor of law at the Vanderbilt Law School.

Cary Franklin is a professor of law at the University of Texas School of Law.

Nancy Gertner is a retired federal district judge and a professor of practice at the Harvard Law School.

Mitu Gulati is a professor of law at the Duke University Law School.

Craig Gurian is the executive director of the Anti-Discrimination Center and an adjunct professor of law at the Fordham Law School.

Nan D. Hunter is a professor of law and associate dean for Graduate Programs at the Georgetown University Law Center.

Olatunde Johnson is a professor of law at the Columbia Law School.

Ellen D. Katz is the Ralph W. Aigler Professor of Law at the University of Michigan Law School.

Sophia Z. Lee is a professor of law and history at the University of Pennsylvania Law School.

Patrick Shin is a professor of law at the Suffolk University Law School.

Julie Suk is a professor of law at the Benjamin N. Cardozo School of Law at Yeshiva University.

Theodore J. St. Antoine is the James E. and Sarah A. Degan Professor Emeritus of Law at the University of Michigan Law School.

Robin L. West is the Frederick J. Haas Professor of Law and Philosophy at the Georgetown University Law Center.